No. 82-

Supreme Court of the United States

OCTOBER TERM, 1982

LONN A. TROST,

Appellant,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,

Appellee.

MANUEL L. ROTHBERG,

Real Party in Interest.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

JURISDICTIONAL STATEMENT

MARTIN I. SHELTON
SHEA & GOULD
Counsel for Appellant
330 Madison Avenue
New York, New York 10017

Question Presented

1. Whether Section 410.10 of the California Code of Civil Procedure, as construed to apply to the facts set forth herein, is violative of the Due Process Clause or the Fourteenth Amendment of the United States Constitution because it impermissibly allows California to exercise *in personam* jurisdiction over a non-resident attorney merely by alleging a fraudulent conspiracy between he and his client although that non-resident attorney has no contacts with the State of California.

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No. 82-

LONN A. TROST,

Appellant,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,

Appellee.

MANUEL F. ROTHBERG,

Real Party in Interest.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

JURISDICTIONAL STATEMENT

Opinions Below

On August 23, 1982, a Petition for a Hearing before the Supreme Court of the State of California was filed. The Petition was denied on September 22, 1982, without opinion and appears in the appendix hereto, p. 1a, *infra.*

On August 4, 1982, a Petition for Writ of Mandate was filed with the Court of Appeal of the State of California,

Second Appellate Division. The Writ of Mandate was denied on August 13, 1982, without opinion and appears in the appendix hereto, p. 2a, *infra.*

Appellant filed a Notice of Motion to Quash Service of Summons, a Declaration, and Memorandum of Points and Authorities on June 28, 1982, on the grounds that he is a non-resident of California and he has no contact upon which to base the exercise of jurisdiction by California. This motion was denied, without opinion, on July 26, 1982, and appears in the appendix hereto, p. 3a, *infra.*

Jurisdiction

Lonn A. Trost, the appellant, appeals from the final determination of the Supreme Court of the State of California, dated September 22, 1982, denying appellant permission for a Hearing in said Court, thereby upholding the constitutionality of California Code of Civil Procedure § 410.10 as applied in this case. On October 21, 1982, this Court, per Justice Rehnquist, granted a stay of this proceeding as it pertains to appellant in order to perfect an appeal to this court and receive a final determination in this matter. The stay was vacated on October 27, 1982 and as a result Trost was obligated to answer the complaint.

A notice of appeal to this Court was duly filed in the Court of Appeal of the State of California and the Superior Court, County of Los Angeles, on October 15, 1982. *See* appendix, p. 4a, *infra.*

This appeal is being docketed in this Court within 90 days from the denial of a Petition for Hearing below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). A direct Appeal to this Court is proper in this case because the California Courts have construed § 410.10

so as to apply to appellant despite appellant's continued contention that such application is unconstitutional. This Court has consistently held that "a state statute is sustained within the meaning of § 1257(2) when a state court holds it applicable to a particular set of facts as against the contention that *such application* is invalid on federal grounds." *Japan Line Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 441 (1979) (emphasis added). *See also Cohen* v. *California*, 403 U.S. 14, 17 (1971) (This Court held an "appeal" was properly taken where appellant consistently contended that "as construed to apply to the facts of this case" the state statute in question infringed on his constitutional rights.)

Constitutional Provisions and Statutes

1) Fourteenth Amendment, United States Constitution: No state shall make or enforce any law which . . . shall . . . deprive any person of life, liberty, or property, without due process of law.

2) California Code of Civil Procedure Section 410.10: A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

* * * * *

Raising the Federal Question

At the earliest possible moment in this action, in his Memorandum of Points and Authorities in support of his Motion to Quash Service of Summons, appellant raised the claim that the exercise of personal jurisdiction over him would violate the Due Process Clause of the Fourteenth

Amendment to the United States Constitution. In denying appellant's motion without opinion, the Superior Court did not address the constitutional issue.

The constitutional claim was pressed by appellant in his Petition for a Writ of Mandate before the Court of Appeal of the State of California, Second Appellate Division. The Court of Appeal denied the Writ without opinion, so once again the constitutional claim was not addressed.

After being denied a Writ of Mandate, appellant submitted a Petition for a Hearing to the Supreme Court of the State of California in which appellant again pressed his constitutional claim. By denying appellant's Petition for a Hearing, the California Supreme Court rejected the federal constitutional claim and thereby denied appellant any further California forum in which to litigate these substantial questions.

Statement of the Case

This appeal involves a cross-complaint in an action commenced by W & J Sloane of Beverly Hills, Inc. ("Sloane"), a wholly-owned subsidiary of Beck Industries, Inc. ("Beck"), against Manuel F. Rothberg ("Rothberg"), wherein Sloane alleges that it has sustained damages due to Rothberg's breach of trust, and misappropriation of corporate funds (the "Action"). Rothberg filed a cross-complaint against Sloane, Stephen Kirschenbaum, in his capacity as Reorganization Trustee of Beck, Lonn A. Trost and Leonard Unger. Rothberg alleges fraud and wrongful discharge as against cross-defendant and appellant herein, Lonn A. Trost ("Trost").

Trost is a member of the New York law firm of Shea & Gould, which firm was by order of the United States

District Court for the Southern District of New York retained as general counsel to represent the Reorganization Trustee of Beck and as such represents Stephen Kirschenbaum in his capacity as Trustee of Beck (the "Trustee").

Trost has never been in California. Trost's domicile and residence are in the state of New Jersey. He is licensed to practice law in the state and federal courts of New York and he is not licensed to practice law in California. He has never owned any property in California, nor ever paid taxes in California. He has never conducted any business in California, nor ever conducted any business with a California resident.

Beck filed a petition for reorganization under Chapter X of the Bankruptcy Act on May 27, 1971 in the United States District Court of the Southern District of New York (the "Court"); that petition was approved by an order dated May 27, 1971. Stephen Kirschenbaum was duly appointed as successor Reorganization Trustee by order dated March 10, 1975 and is now acting as such Trustee.

Trost's firm and its predecessor firm have represented all the reorganization trustees since their initial appointments. Trost's representation of the Trustee, on behalf of Shea & Gould, has been limited to the rendering of legal advice and counsel to the reorganization trustees. Neither Trost nor his firm was ever a "business advisor" to the Trustee, as alleged in the cross-complaint.

Sloane is a wholly-owned subsidiary of Beck. On December 1, 1981, Trost received a telephone call from Rothberg, then the chief executive officer of Sloane, advising him, *inter alia,* that there was to be a meeting in the Trustee's office in New York City the following week. Rothberg also advised Trost of certain demands he was going to make or already had made upon the Trustee. Trost told Rothberg

that he was not aware of the prospective meeting or what was proposed to be discussed thereat, but that as the Trustee's counsel he would be there if required by the Trustee.

On December 9, 1981, a meeting was held in the Trustee's office in New York to discuss the sale of Sloan's major asset, its interest in its leases, and Trost was present as counsel to the Trustee to discuss the sale of the leases and review a proposed agreement therefore. Rothberg attended this meeting so as to introduce a prospective purchaser of the leases to the Trustee. Following the meeting, as Trost was leaving, Rothberg and the Trustee discussed Rothberg's role in the prospective liquidation of Sloane's remaining inventory. The Trustee was explaining to Rothberg that Rothberg would receive a percentage of the inventory sales rather than a flat "finder's fee" for his services. The Trustee then asked Trost whether any agreement which might be reached between the Trustee and Rothberg concerning the latter's role in the liquidation required Court approval. Trost initially tried to explain to Rothberg that what the Trustee was trying to say was that the payment of a finder's fee could not be authorized by the Trustee but if the Trustee and Rothberg could agree upon an amount to be paid to Rothberg, the two of them could structure a situation so that Rothberg would be in a position to receive an equivalent sum. Trost then advised the Trustee that while no Court approval was necessary, it would be appropriate, in order to ensure complete disclosure, that any prospective role by Rothberg be reflected in the court application pertaining to the sale of the leases. Trost then left the meeting as Rothberg and the Trustee continued their discussion.

Historically, in the Beck proceeding the Court has held hearings whenever there was to be, *inter alia*, either a transfer or sale of the stock or substantially all of the assets of any subsidiary of Beck. Thus, at the Trustee's direction,

an application (the "Application") was prepared and on December 24, 1981 submitted to the Court. On said date the Court directed all interested parties to show cause why the Court should not enter an order authorizing the Trustee "to take such appropriate action as may be necessary to cause Sloane to sell its interest in the [Sloane] leases, and authorizing a liquidation sale."

On January 11th and 12th, 1982 a hearing was held at which time a bid for the leases was received and the sale thereof was "confirmed to the extent it was within the authority of the Court to do so." (Transcript of Hearing on Order to Show Cause to Sell W & J Sloane, Beverly Hills, Cal. Lease before Hon. Edward J. Ryan, United States Bankruptcy Court, Southern District of New York, p. 22.) Subsequently, the Court signed an order authorizing the Trustee to take such appropriate action as necessary to cause Sloane to sell its interest in the lease.

Trost had no contact or other communication with Rothberg between December 9, 1981 and the present, aside from three or four brief telephone conversations, the last of which took place on February 18, 1982.

"The instant action was instituted against [Trost] . . . since . . . he would not consent to the taking of . . . his deposition" in connection with the action. This statement was made to United States Bankruptcy Judge Edward J. Ryan by Rothberg's own New York counsel Robert Rosenberg, Esq. of the law firm of Moses & Singer during a Chambers conference two months after the cross-complaint was served. However, on June 17, 1982, without appearing in the instant case or otherwise prejudicing any rights Trost may have had in connection with this cross-claim, he voluntarily appeared as a witness and was deposed by Mr. Rosenberg.

These are the circumstances in which California has attempted to assert personal jurisdiction over Trost.

Trost filed a Notice of Motion and Motion to Quash Service of the Summons, a Declaration, and Memorandum of Points and Authorities on June 28, 1982 on the ground that Trost did not have sufficient minimum contacts with California upon which to base the exercise of jurisdiction by California. On July 26, 1982, the Superior Court denied the motion to dismiss without opinion.

On August 4, 1982, a Petition for Writ of Mandate was filed with the Court of Appeal of the State of California, Second Appellate Division. The Writ of Mandate was denied on August 13, 1982.

On August 23, 1982, a Petition for a Hearing was submitted to the Supreme Court of the State of California. The Petition for a Hearing was denied on September 22, 1982.

On October 5, 1982, Trost, by special appearance, submitted an *ex parte* application to the California Superior Court seeking an order staying his time to respond to the Cross-Complaint until this Court ruled on his appeal or, alternatively, for an order extending his time to respond to the Cross-Complaint until this Court ruled on his appeal. The California Superior Court denied the motion to stay without prejudice to its renewal upon the filing of Petitioner's appeal to this Court.

On October 12, 1982, Trost, by special appearance, again submitted an application to the California Superior Court seeking an order staying his time to respond to the Cross-Complaint until this Court ruled on his appeal. Suggesting that the California Court of Appeal was the proper forum to issue the stay, the Superior Court denied Trost's

application so as to enable him to renew his application for a stay to said California Court of Appeal on or before October 22, 1982.

On October 15, 1982, a Notice of Appeal to the United States Supreme Court and an Application for a Stay were filed with the Court of Appeal of the State of California, Second Appellate Division. On October 19, 1982, the California Court of Appeal, Second Appellate Division, ruled that it was without jurisdiction to issue the stay requested.

On October 20, 1982, an Application for an Emergency Stay of the Superior Court proceedings was submitted to Justice William H. Rehnquist. Justice Rehnquist granted such stay on October 21, 1982, pending the receipt of response to the application and further order of either Justice Rehnquist or of this Court.

On October 27, 1982, Justice Rehnquist vacated the aforementioned stay upon receipt of Rothberg's response, without opinion.

Trost answered the cross-complaint on October 29, 1982.

Trost performed no activities and rendered no advice to the Trustee or Sloane in connection with either the commencement of the action by Sloane against Rothberg or Rothberg's dismissal. He only learned of the aforesaid events after they had occurred.

The Questions Are Substantial

Whether a state statute can be construed so as to permit the exercise of jurisdiction over a non-resident with no contacts with the forum state merely because fraud is alleged is a question of substantial constitutional implications. The precise question presented here has never been treated by this Court.

This Court has well established the principle that a proper exercise of *in personam* jurisdiction requires certain minimum contacts between the defendant and the forum state. In *International Shoe Co.* v. *Washington*, 326 U.S. 310, 316 (1945), this Court held that "due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend the traditional notions of fair play and substantial justice. . . ." This standard of "minimum contacts" has been the cornerstone of every personal jurisdiction issue to be decided by this Court, *see Rush* v. *Savchuk*, 444 U.S. 320, 332 (1980); *Shaffer* v. *Heitner*, 433 U.S. 186, 212 (1977), and the present action is no exception. Never before has this Court been faced with such an expansion of the due process limits placed on the exercise of *in personam* jurisdiction.

The constitutionality and expanse of Section 410.10 of the California Code of Civil Procedure as applied in the instant case were questions raised below. There have been no opinions issued by the California Courts in their denial of Trost's Motion to Quash and the appeals therefrom. Yet the alleged basis for jurisdiction herein becomes clear upon examination of the different "Bases of Judicial Jurisdiction over Individuals" as construed by the Judicial Council Comments on § 410.10 of The California Code of Civil Procedure:

"(1) Presence

(2) Domicil

(3) Residence

(4) Citizenship

(5) Consent

(6) Appearance

(7) Doing Business in State

(8) Doing an Act in State

(9) Causing Effect in State by Act or Omission Elsewhere

(10) Ownership, Use or Possession of Thing in State

(11) Other Relationships"

It is immediately apparent that none of these bases can have any application to appellant-Trost except No. (9), the "effects test". The California "effects" or "foreseeability" test was addressed by this Court in *World-Wide Volkswagon Corp.* v. *Woodson,* 444 U.S. 285 (1980) wherein the Court affirmed that certain minimum contacts are required in order to afford a constitional bases for jurisdiction. *See also Kulko* v. *California Superior Court,* 436 U.S. 84, 97-98 (1978).

The petitioners in *World-Wide* were New York corporations sued in Oklahoma State Court by respondents to recover for personal injuries sustained in an automobile accident that occurred while respondents were driving through Oklahoma. Respondents were New York residents who purchased the automobile from petitioners in New York and the petitioners did no business in Oklahoma.

This Court found that the isolated incident upon which respondents cause of action was based was insufficient grounds upon which to exercise jurisdiction. The minimum contacts standard was not satisfied because of the lack of those affiliating circumstances which are a necessary predicate to any exercise of State Court jurisdiction.

> Petitioners carry on no activity whatsoever in Oklahoma. They close no sales and perform no services there. They avail themselves of none of the privileges and benefits of Oklahoma law. They solicit no business there either through salespersons or through advertising reasonably calculated to reach the State. Nor does the record show that they regularly sell cars at wholesale or retail to Oklahoma customers or residents or that they indirectly, through others, serve or seek to serve the Oklahoma market. In short, respondents seek to base jurisdiction on one isolated occurrence and whatever inferences can be drawn therefrom. . . .

World-Wide, supra, 444 U.S. at 295.

Similarly, there are none of the "affiliating circumstances" which serve as a necessary predicate to an exercise of jurisdiction in this case. Trost carries on no activity whatsoever in California. He is not licensed to, and has never practiced law in California. He avails himself of none of the privileges and benefits of California law. Appellee seeks to base the exercise of jurisdiction on his allegation that appellant made misrepresentations at a meeting in New York City where he was present, on behalf of Shea & Gould, representing the Trustee in negotiations concerning the sale of Sloane's leases. More specifically it is alleged that Appellant told Appellee that he would receive 10% of the gross proceeds of the profits from Sloane's liquidation sale.

As previously discussed when Appellant Trost was leaving the meeting, Rothberg and the Trustee were having a separate discussion concerning Rothberg's role in the prospective liquidation of Sloane's remaining inventory. The Trustee was explaining to Rothberg that Rothberg would receive a percentage of the inventory sales rather than a

flat "finder's fee" for his services. The Trustee then asked Trost whether any agreement which might be reached between the Trustee and Rothberg concerning the latter's role in the liquidation required Court approval. Trost initially tried to explain to Rothberg that what the Trustee was trying to say was that the payment of a finder's fee could not be authorized by the Trustee but if the Trustee and Rothberg could agree upon an amount to be paid to Rothberg, the two of them could structure a situation so that Rothberg would be in a position to receive an equivalent sum. Trost then advised the Trustee that while no Court approval was necessary, it would be appropriate, in order to ensure complete disclosure, that any prospective role by Rothberg be reflected in the court application pertaining to the sale of the leases. Trost then left the meeting as Rothberg and the Trustee continued their discussion.

In this case, there are no allegations that Trost made any statements as to Rothberg's role in the liquidation sale on behalf of himself rather than as counsel for the Trustee.* There has been no evidence presented or referred to which even suggests that any representation made by Trost was false at all. Certainly, Appellant's presence at that New York meeting was not an affiliating circumstance such that it was foreseeable that Trost might be called into a California forum.

Additionally, this Court has recognized that the foreseeability that is critical to due process analysis "is that the defendant's conduct and connection with the forum State

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* It does not even appear that Rothberg has stated a claim against Trost upon which relief could be granted. Even taking his allegations as true, as the Ninth Circuit Court of Appeals recently held in *Los Angeles Airways, Inc.* v. *Davis*, 687 F.2d 321 (9th Cir. Sept. 17, 1982), legal advice, rendered in good faith, is privileged and the attorney-advisor is immune from liability.

are such that he should *reasonably anticipate* being haled into Court there." *World-Wide, supra,* 444 U.S. at 286 (emphasis added). This is required in order to give "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render him liable to suit." *Id. See Shaffer, supra,* 433 U.S. at 216. An attorney could certainly not reasonably anticipate that if he were to render legal advice to a client concerning a resident of a different state, that he could be forced to personally defend an action in that distant forum arising out of his client's independent transactions.

Appellant urges that the important due process concerns of reasonableness and fairness have been blatantly violated in the case at bar. Appellant here has had no contact nor sought any contact with California. Rather, Appellee Rothberg came to New York to solicit business for himself from the Trustee. At that time Trost rendered legal advice to the Trustee, his client, on whether the agreement between "the Trustee and Rothberg" would have to be court approved. He further explained to Rothberg what his client, the Trustee, proposed in the alleged agreement to pay Rothberg 10% of the proceeds of Sloane's liquidation sale. These are the actions upon which California is attempting to base personal jurisdiction over Trost. Thereafter, Rothberg proceeded to return to California and carry out his plans without Trost's knowledge at any step along the way. Otherwise stated, it seems that Rothberg's contacts with the forum were decisive in determining whether defendant had the requisite minimum contacts upon which to base jurisdiction. Such an approach is forbidden by *International Shoe* and its progeny. *See Rush, supra,* 444 U.S. at 332. As this Court aptly stated:

> The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

Hanson v. *Denckla*, 357 U.S. 235, 253 (1958).

It is respectfully submitted that § 410.10, as construed by the California Courts to apply to the above circumstances, has so expanded the doctrine of minimum contacts that state lines are now irrelevant for jurisdictional purposes. Appellant urges this Court to reinstate some sense of order and predictability to the legal system that allows potential defendants to reasonably anticipate where their conduct may render them liable to suit and more specifically, to allow an attorney to give his educated legal advice without the burden of worrying about defending a retaliatory suit in a distant forum. Accordingly, the statute as construed should be declared unconstitutional under the Due Process Clause of the Fourteenth Amendment.

Conclusion

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

/s/ MARTIN I. SHELTON
MARTIN I. SHELTON
SHEA & GOULD
Counsel for Appellant
330 Madison Avenue
New York, New York 10017

Dated: New York, New York
December 17, 1982

APPENDIX

Decision of the Supreme Court of the State of California Denying the Petition for a Hearing

CLERK'S OFFICE, SUPREME COURT
4250 State Building
San Francisco, California 94102

In re: 2 Civil No. 66043

LONN A. TROST

vs.

SUPERIOR COURT, L.A.
(ROTHBERG)

HEARING DENIED

Respectfully,

Clerk

Envelope—Addressed To

MARTIN I. SHELTON
LEVINE, KROM AND UNGER
404 North Roxbury Drive
Beverly Hills, Ca. 90210

Decision of California Court of Appeal, Second Appellate Division, Denying Writ of Mandate

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION FOUR

2d Civ. No. 66043

(L.A. Super. Ct. No. WEC 073070)

(Jerry Pacht, Judge)

LONN A. TROST,

Petitioner,

v.

SUPERIOR COURT OF THE COUNTY OF LOS ANGELES,

Respondent,

MANUEL F. ROTHBERG,

Real Party in Interest.

THE COURT:*

The petition for writ of mandate filed August 4, 1982, has been considered and is denied.

ORDER
Court of Appeal-Second Dist.

FILED
Aug 13 1982

Clay Robbins, Jr.
Clerk

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* KINGSLEY, Acting P.J., MCCLOSKY, J., AMERIAN, J.

Order of Superior Court of the State of California, County of Los Angeles, Denying Motion to Quash Service of Summons

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

Dept. WE-P

Date—July 26, 1982

Honorable
JERRY PACHT
Judge

P. PAPPAS
Deputy Clerk

WEC 73070

W & J SLOANE OF BEVERLY HILLS, INC.,
a Delaware Corporation

vs.

MANUEL F. ROTHBERG, ET AL.,

Counsel for Plaintiff
VALENSI AND ROSE (No Appearance)

Counsel for Defendant
LEVINE, KROM & UNGER (No Appearance)
MARTIN I. SHELTON (No Appeaarnce)

NATURE OF PROCEEDINGS

1. Cross-Deft (Lonn A. Trost) Motion to Quash Service of Summons
(Submitted Matter)

Order of Superior Court of the State of California, County of Los Angeles, Denying Motion to Quash Service of Summons

1. In this matter, heretofore taken under submission as of July 16, 1982, the Court renders its decision as follows:

   Motion to quash service of summons as to Lonn A. Trost denied.
   Counsel for respondent(s) to give notice.

2. Defendant/Cross-Complainant's Request for Ruling On Previous Request For An Award of Expenses and Attorneys' Fees Pursuant to C.C.P. Section 128.5

2. Defendant/Cross-Complainant's request for expenses and attorneys' fees is denied without prejudice.
   Copy of this minute order is sent this date by U.S. Mail to counsel for the respective parties.

Minutes Entered
7/26/82
County Clerk

Notice of Appeal to the Supreme Court of the United States

IN THE COURT OF APPEALS OF THE STATE OF CALIFORNIA

SECOND APPELLATE DIVISION

2d Civ. No. 66043

(L.A. Super.Ct. No. WEC 073070)

LONN A. TROST,

Appellant,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,

Appellee.

MANUEL F. ROTHBERG,

Real Party in Interest.

Notice is hereby given that LONN A. TROST, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of California, entered in this action on August 13, 1982, denying the petition for a Writ of Mandate which effectively affirmed the Superior Court of the State of California's denial of appellant's Motion to Quash Service of Summons. On September 22, 1982 the

Notice of Appeal to the Supreme Court of the United States

Supreme Court of the State of California denied appellant's Petition for a Hearing.

This Appeal is taken pursuant to 28 U.S.C. § 1257(2).

/s/ MARTIN I. SHELTON
Martin I. Shelton
Counsel for Appellant
SHEA & GOULD
330 Madison Avenue
New York, New York 10017

Affidavit of Mailing

IN THE COURT OF APPEALS OF THE STATE OF CALIFORNIA

SECOND APPELLATE DIVISION

No. WEC 073070

LONN A. TROST,

Appellant,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,

Appellee.

MANUEL F. ROTHBERG,

Real Party in Interest.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

Melanie Boast, being duly sworn, deposes and says:

1. Deponent is in the employ of Shea & Gould, attorneys for Lonn A. Trost, Appellant herein, is over 18 years of age, is not a party to this action and resides at 140-21 31st Road, Linden Hill, New York 11354.

2. Deponent served the within NOTICE OF APPEAL on October 13, 1982 upon those listed on the schedule which is annexed hereto and made a part hereof, being all of those required to be served, by depositing a true and correct copy of same properly enclosed and addressed in a post-paid, certified mail envelope in an official depository maintained and exclusively controlled by the United States Post

Affidavit of Mailing

Office Department at 330 Madison Avenue, New York, New York 10017, said address being the post office address of the attorneys for the Appellant.

/s/ MELANIE BOAST
Melanie Boast

Sworn to before me this
13th day of October, 1982.

/s/ VICTORIA MCLOUGHLIN
Victoria McLoughlin

Notary Public, State of New York
No. 41-4676258
Qualified in Queens County

Commission Expires March 30, 1984

SCHEDULE

Levine, Krom & Unger
Suite 600
404 North Roxbury Drive
Beverly Hills, California 90210

Jones & Wilson
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Roger P. Heyman, Esq.
Valensi and Rose, PLC
1880 Centruy Park East, # 1518
Los Angeles, California 90067

Stephen Kirschenbaum, Esq.
350 Madison Avenue
New York, New York 10017

NO. 82-1037

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LONN A. TROST,

Appellant,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,

Appellee.

MANUEL F. ROTHBERG,

Real Party in Interest.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT DIVISION FOUR

MOTION TO DISMISS OR AFFIRM

ROGER P. HEYMAN, ESQ.
STUART L. BRODY, ESQ.
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(213) 277-8011
Counsel for Real Party In Interest

The Brief Shop • Legal Printers • (213) 877-8620

QUESTIONS PRESENTED

1. WHERE AN OUT OF STATE RESIDENT MAKES AFFIRMATIVE FRAUDULENT REPRESENTATIONS IN A COMMERCIAL TRANSACTION TO A CALIFORNIA RESIDENT WHICH ARE INTENDED TO CAUSE AND WHICH CAUSE THE CALIFORNIA RESIDENT TO PERFORM ACTIONS IN CALIFORNIA, AND WHICH ARE INTENDED TO CAUSE AND WHICH CAUSE DAMAGE IN CALIFORNIA, IS IT CONSTITUTIONAL, REASONABLE AND FAIR TO REQUIRE THE INTENTIONAL TORTFEASOR TO DEFEND IN THE STATE WHERE HE INTENDED HAS MISFEASANCE TO BE EFFECTIVE?
2. DOES CALIFORNIA LAW PROVIDE FOR AN EVIDENTIARY HEARING PROVIDING FOR DUE PROCESS OF LAW REGARDING THE FACTS ON WHICH JURISDICTION RESTS OR, AS APPELLANT ASSERTS, IS JURISDICTION EXERCISED ON THE "MERE ALLEGATION" OF FRAUD?
3. DOES A SUBSEQUENT GENERAL APPEARANCE IN THE SUPERIOR COURT BY APPELLANT WHICH WAIVED HIS JURISDICTIONAL OBJECTION RENDER THE INSTANT APPEAL MOOT?

4. DOES AN APPEAL LIE TO THIS COURT WHERE THE OBJECTION RAISED BELOW WAS THAT THE CONSTITUTION DID NOT PERMIT THE EXERCISE OF JURISDICTION BY CALIFORNIA AND NOT THAT A STATUTE WHICH IS COEXTENSIVE WITH THE FEDERAL CONSTITUTION WAS UNCONSTITUTIONAL AS APPLIED?

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NO. 82-1037

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LONN A. TROST,

Appellant,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,

Appellee.

MANUEL F. ROTHBERG,

Real Party in Interest.

ON APPEAL FROM THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT DIVISION FOUR

MOTION TO DISMISS OR AFFIRM

Real Party in Interest Manuel F. Rothberg moves that the appeal be dismissed or in the alternative be summarily affirmed.

STATEMENT OF THE CASE

1. Mr. Rothberg, a California resident, sued the Appellant in California because the Appellant intentionally made fraudulent misstatements to Mr. Rothberg which were intended to and did induce Mr. Rothberg to perform major actions in California, and to incur damages in California.

2. Appellant moved to quash the action against him in California on the basis of lack of jurisdiction, not on the basis of the unconstitutionality of the California jurisdictional statute.

3. An evidentiary hearing was held in the California Trial Court, and based on long established law, and on the facts found after hearing by the Trial Court, the motion to quash was denied.

4. Appellant then filed a Petition for Writ of Mandate to the California Court of Appeal. The Petition was considered and denied by the Court of Appeal.

5. Appellant sought a hearing thereon in the California Supreme Court. The request was considered and denied by the California Supreme Court.

6. Appellant then twice sought a stay of proceedings in the California Trial Court; twice the request was considered and twice denied.

7. After Appellant filed a Notice of Appeal from the decision of the Court of Appeal he also sought a stay of proceedings in the Court of Appeal. T[illegible] request was considered and denied.

8. Appellant then applied for an Emergency Stay from Mr. Justice Rehnquist wherein Appellant asserted that

unless the stay was granted he would have to make an appearance in California thereby causing him to lose his ability to object to jurisdiction in California (pp. 6:26-7:1; 7:28-8:7). The stay was denied on October 27, 1982. (Case No. A-369)

9. On October 29, 1982, Appellant served and filed an Answer in the Superior Court. He concedes the filing of an Answer on page 9 of the Jurisdictional Statement.

10. In his Jurisdictional Statement, as he had done in this Court in his Application for Stay, in the California Supreme Court, in the California Court of Appeal and in the California Trial Court, Appellant ignores the real facts and makes self-serving statements which he then attempts to elevate into facts. If Appellant's "facts" were the true facts, the results might have been different in the Courts Below, but they are not anywhere near the true facts, as the Courts Below could and did easily determine from the record and the evidence presented to them.

11. The verified answer to the Petition for Writ of Mandate in the California Court of Appeal and the verified cross-complaint in the Trial Court set forth the true facts. Real Party in Interest Manuel F. Rothberg was the president of W. & J. Sloane of Beverly Hills. Sloane is a wholly-owned subsidiary of Beck Industries, Inc. Beck has been in bankruptcy reorganization for twelve years. Appellant was Beck's Trustee's attorney. Mr. Rothberg was promised by *Appellant* that he would receive 10% of the gross proceeds of a Sloane going out of business sale if he would conduct such a sale in California. That promise was first discussed in a telephone call by *Appellant* to Mr. Rothberg in California and then made at a meeting with the *Appellant* in New York City. At that meeting, *Appellant* affirmatively represented to Mr. Rothberg that the

agreement need not be reduced to writing because the 10% of the gross proceeds agreement would be contained in an application to the Federal Bankruptcy Court.

12. The Bankruptcy Application was then prepared and mailed by *Appellant* to the Bankruptcy Court and to Mr. Rothberg and it also affirmatively represented, *now in writing*, that Mr. Rothberg would receive 10% of the "net profit." The text of paragraph 7 of the Application is set forth in Appendix A hereto.

13. The Trustee, Mr. Kirschenbaum, [1/] in writing, then appologized to Mr. Rothberg for the error of referring to "net profit" and indicated that Appellant would correct this error. The text of the telegram so stating is set forth in Appendix B hereto.

14. *Appellant* then wrote to the Bankruptcy Court, copied to Mr. Rothberg, and corrected the error by affirmatively representing to the Bankruptcy Court and Mr. Rothberg that Mr. Rothberg was to receive 10% of the "gross proceeds" not 10% of the "net profit." These representations to the Bankruptcy Court are not mere documents filed with the Bankruptcy Court but written memoranda of the agreement and affirmative representations by *Appellant* to Mr. Rothberg setting forth precisely what the agreement was. The text of the letter by Appellant to the Bankruptcy Court is set forth in Appendix C hereto.

15. Mr. Rothberg, in California, then, and in intended reliance on these oral and written representations of *Appellant*, spent over two months conducting the going out of business sale.

[1/] The Trustee is also a cross-defendant. He was ordered by the Bankruptcy Court to submit to jurisdiction in California.

16. When over $8,000,000 had been received by Sloane, and much of the profit transferred to New York, Appellant suddenly repudiated the agreement — set forth in black and white in documents filed by Appellant in the Bankruptcy Court — by contending that a flat sum of $250,000 had been agreed to, not the 10% of the gross proceeds for which there is objective evidence over Appellant's own signature.

17. That *Appellant* represented to Mr. Rothberg that he would receive 10% of the gross proceeds is clear and irrefutable; indeed it is the subject of judicial notice of the Bankruptcy Court files. By contending that in spite of the clear, unambiguous language of the Application and letter that nevertheless the agreement was that Mr. Rothberg would receive a flat $250,000, and the flat fee antedates the Application and letter then, *a fortiari*, Appellant establishes that there was no intent to honor the 10% of the gross proceeds representations when they were made. That is fraud.

18. Mr. Rothberg makes three main arguments in support of his motion to dismiss or summarily affirm: (1) A discussion of the merits of the minimum contact claim; (2) a discussion of the California procedures used to determine the case and Appellant's attempt to have Appellate Courts reweigh the facts; and (3) a discussion of the reasons why the matter should be dismissed, including mootness.

ARGUMENT

1. MOTION TO AFFIRM

A.

WHERE AN OUT OF STATE RESIDENT MAKES AFFIRMATIVE FRAUDULENT REPRESENTATIONS IN A COMMERCIAL TRANSACTION TO A CALIFORNIA RESIDENT WHICH ARE INTENDED TO CAUSE AND WHICH CAUSE THE CALIFORNIA RESIDENT TO PERFORM ACTIONS IN CALIFORNIA AND WHICH ARE INTENDED TO CAUSE AND WHICH CAUSE DAMAGE IN CALIFORNIA, IT IS CONSTITUTIONAL, REASONABLE AND FAIR TO REQUIRE THE INTENTIONAL TORTFEASOR TO DEFEND IN THE STATE WHERE HE INTENDED HIS MISFEASANCE TO BE EFFECTIVE

The basis of Appellant's Jurisdictional Statement consists in essence of:

1. A bald, incorrect assertion that the basis of the rulings of the Courts Below was that jurisdiction is automatically obtained by "a mere allegation" of fraud, an assertion which Mr. Rothberg interprets as an unarticulated challenge that California procedural law violates Due Process of Law; and
2. A bald, incorrect assertion that jurisdiction is based on purported specious allegations that an

> attorney entered into a conspiracy because of the attorney's self proclaimed conclusion — ignoring the facts — that all he did was provide legal representation to his client.

The facts are that *Appellant* himself affirmatively represented to Mr. Rothberg that Mr. Rothberg would receive 10% of the gross proceeds of the sale and that the agreement would be reduced to writing in the form of the Application to the Bankruptcy Court, and that *Appellant* himself affirmatively represented in the Application and letter — sent to Mr. Rothberg — that 10% of the gross proceeds was the agreement. As discussed in the following section, the Trial Court held an *evidentiary hearing* and the intendments in this proceeding, as they always are in an Appellate Court, are that the Courts Below found the facts to be those favorable to their decisions, not the version argued by Appellant. It is elementary that Appellate Courts review errors of law and do not reweigh the evidence, and a proper argument to an Appellate Court weighs the facts accordingly.

The entire appeal is premised upon ignoring the true and determined facts regarding Appellant's actions and blatantly asserting as a given fact that the "only" thing Appellant did was give legal representation to his client [2/] and that he made none of the representations which the Courts Below found he made. That kind of appeal does not effectively challenge the constitutionality of the California statute "as applied" and does not raise a substantial Federal question on appeal. The function of appeals to this Court is not to reweigh the evidence. Because we believe that Appellant is merely rearguing the evidence and that this does not present a substantial Federal

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[2/] It is axiomatic under the substantive law of agency that even if he were an agent, and he committed a tort in the course and scope of his agency, he is still legally accountable for his own torts.

question, we discuss the motion to affirm first so the Court may understand the issues which Appellant declines to discuss.

The question is if a sister state resident makes affirmative, fraudulent representations in a commercial transaction to a California resident which are intended to cause and which cause the California resident to perform actions in California and are intended to cause and which cause damage in California, is it reasonable and fair to require the intentional tortfeasor to defend in the state where he intended his misfeasance to be effective?

The answer is that it is constitutional, fair and equitable for California to exercise jurisdiction where "the conduct charged is an intentional and malicious tort" against a forum-based victim.

> ". . . It is just as reasonable and fair, and maybe more so, to subject a defendant to the jurisdiction of a state when it engages in conduct which is purposefully intended to harm a resident of that state as it is to subject a defendant to the jurisdiction of a state when that defendant has sought or anticipated economic benefit in that state from its out-of-state activities."
> ***Abbott Power Corp. v. Overhead Electric Co.*** (1976) 60 Cal.App.3d 272, 281-282, 131 Cal.Rptr. 508.

In ***Abbott***, the victim was a California-based corporation; here we have an individual who is even more deserving of the benefits of the long arm statutes.

The statutory basis for California's exercise of jurisdiction is California Code of Civil Procedure Section 410.10:

> "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

California and federal courts have interpreted this statute as permitting the exercise of jurisdiction to the fullest extent possible limited only by the Due Process clause of the Fourteenth Amendment of the United States Constitution. ***Michigan Nat. Bank v. Superior Court*** (1972) 23 Cal. App.3d 1, 6, 99 Cal.Rptr. 823. Certainly since the state exercised jurisdiction there is no independent state constitutional issue.

The Ninth Circuit Court of Appeals also recognizes that there is a material difference as to the level of state interest and the level of minimum contacts for jurisdictional purposes when there is an intentional tort intended to cause damage in a particular state. In ***Data Disc, Inc. v. Systems Tech Assoc., Inc.*** (9th Cir., 1977) 557 F.2d 1280, the Court had no difficulty in distinguishing between an intentional and non-intentional tort, and in a fraud situation finding sufficient minimum contacts under ***Abbott Power, supra*** and ***Hanson v. Denckla*** (1958) 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283.

This Court reviewed the California statute in ***Kulko v. Superior Court of California, etc.*** (1978) 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132. It correctly noted that California follows the "effects test" of the Restatement, referring to the "shoot the bullet" example of the Restatement. 436 U.S. at 96.

Appellant herein never articulates the true issue, nor does he seem capable of upholding his side of the issue in argument before this Court. The standard of minimum contacts and fundamental fairness is not in dispute. The question is

what level of minimum contacts comport with fundamental fairness when there is an intentional tort in a business transaction.

Citing cases such as ***World-Wide Volkswagon Corp. v. Woodson*** (1980) 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490, a products liability case, does not address the questions. What constitutes sufficient minimum contacts in a products liability case is of no help in deciding what is reasonable regarding the instant intentional tort. Nor does citing ***Los Angeles Airways, Inc. v. Davis*** (9th Cir., 1982) 687 F.2d 321 have anything to do with the case. ***Davis*** was a diversity case which discussed California substantive law regarding the privilege of an attorney to advise his client as a defense to a suit for inducing breach of contract. It is not a jurisdiction case and this Court does not ordinarily review California common law tort actions regarding the correctness of theories under California common law tort law.

In the Courts Below Appellant framed his declarations and argument to try and bring himself under ***Demarest v. Superior Court*** (1980) 103 Cal.App.3d 791, 165 Cal.Rptr. 641, a child custody case where mere advice by an attorney did not confer jurisdiction. ***Demarest*** involved an entirely different type of tort, an entirely different type of factual setting, different policy issues and an absence of the direct, tortious contact between the tortfeasor and the victim involved herein, all of which Appellant chooses to ignore.

On December 15, 1982, the California Court of Appeal once again reiterated that there is a different level of sufficient minimum contacts when there is an intentional tort intended to and causing damage in California. ***Jones v. Calder*** (1982) ____Cal.App.3d____ , ____Cal.Rptr.____ (2d

Civil No. 65403). [3/] The actress, Shirley Jones, sued the National Enquirer and its editor, Mr. Calder, for defamation, invasion of privacy and intentional infliction of emotional distress. Calder moved to quash for lack of sufficient minimum contacts and the motion was granted. The Court of Appeal, in a decision by Justice Lillie, reversed.

At page 13 of the slip opinion the Court states:

> "For the purpose of determining whether a California court may assume jurisdiction over Calder in this lawsuit, it must be presumed that Calder, in participating in the publication of the article as its editor, intended to cause injury to plaintiffs in California where they reside; such injury in fact occurred. Accordingly, a valid basis exists for California's exercise of personal jurisdiction over Calder with respect to the causes of action alleged herein."

The Court goes on to quote, discuss and follow ***Abbott Power, supra.***

In this case, Appellant blithely argues from his version of the facts and never touches on the real issue of whether the facts favorable to the judgment are sufficient minimum contacts when there is an intentional tort intending to and in fact causing effects and damages in California in a commercial transaction. ***Abbott Power, supra,*** contains a concise statement of a rule which permits the exercise of jurisdiction by California and Appellant does not deign to discuss it.

[3/] The decision is still subject to review by the California Supreme Court.

There is no denial of due process in perceiving that the minimum contacts are different for an intentional tort and under the facts of this case it is entirely reasonable for California to exercise jurisdiction over the intentional tortfeasor. An intentional tortfeasor such as Appellant can reasonably anticipate that he will be haled into court where he intends to and in fact causes damage; the converse states an unreasonable proposition which gives an unfair advantage to the intentional tortfeasor.

B.

CALIFORNIA PROCEDURES FOR DETERMINING JURISDICTION COMPORT WITH DUE PROCESS; APPELLANT HAS MISSTATED THE FACTS AND IGNORED THE SUBSTANCE AND EFFECT OF THE PROCEDURES BELOW; HE IS SEEKING A REWEIGHING OF THE EVIDENCE BY THIS COURT AND IS ARGUING FROM THE FINDINGS OF FACT HE WANTS THIS COURT TO MAKE

The procedural posture of this case is that Appellant made a motion to quash pursuant to California Code of Civil Procedure Section 418.10. The section is set forth in Appendix D. Upon denial of the motion he filed a Petition for Writ of Mandate as authorized by that section; California does not permit interlocutory appeals and this is a statutory means of right to obtain appellate review. Upon denial of the Petition, he sought a discretionary hearing in the California Supreme Court which was denied.

In *Data Disc, supra*, the Ninth Circuit went to great lengths to discuss how the affidavits are treated in that Circuit, holding that different standards are applied according to the stage of the proceedings at which the jurisdictional objection is made. The Ninth Circuit, at least at the initial stage, does not weigh the evidence submitted by affidavit.

In California, a motion to quash is an evidentiary hearing. Where a defendant properly moves to quash out of state service of process for lack of jurisdiction, the burden of proof is upon the plaintiff to establish the facts of jurisdiction by a preponderance of the evidence. Evidence of those facts or their absence may be in the form of declarations with the verified complaint being treated as a declaration for that purpose. [4/] The parties have the right to engage in discovery regarding the issues raised on the motion to quash without it constituting a general appearance. The Trial Court has discretion to hear live evidence. Where there is a conflict in the declarations, resolution of the conflict by the Trial Court will not be disturbed on appeal if the determination of that Court was supported by substantial evidence. Resolutions of factual disputes by the Trial Court where the evidence is by declaration are treated exactly in the same manner as if there were live testimony. The Appellate Court does not disturb the implied findings of the Trial Court in support of its order. The Appellate Court does not consider evidence not before the Trial Court and on motion such evidence may be stricken. *Murray v. Superior Court* (1955) 44 Cal.2d 611, 619-620, 284 P.2d 1; *1880 Corporation v. Superior Court* (1962) 57 Cal.2d 840, 22 Cal.Rptr. 209, 371 P.2d 985; *Mission Imports, Inc. v. Superior Court*

[4/] An affidavit is not required; California Code of Civil Procedure Section 2015.5 is equivalent to 28 U.S.C. Section 1746.

(1982) 31 Cal.3d 921, 184 Cal.Rptr. 296, 647 P.2d 1075, at F.N. 5; ***Thomas J. Palmer, Inc. v. Turkiye Is Bankasi*** (1980) 105 Cal.App.3d 135, 145-146, 164 Cal.Rptr. 181; ***Reifler v. Superior Court*** (1974) 39 Cal.App.3d 479 483-484, 114 Cal.Rptr. 356; ***Arnesan v. Raymond Lee Organization, Inc.*** (1973) 31 Cal.App. 3d 991, 994-995; 107 Cal.Rptr. 744; ***Atkins, Kroll & Co. v. Broadway Lumber Company*** (1963) 222 Cal.App.2d 646, 654, 35 Cal.Rptr. 385.

Clearly Appellant's assertion that California exercises jurisdiction on the "mere allegation" of fraud in a complaint is specious. There was an evidentiary hearing in the matter. [5/] It was according to these rules that the Court of Appeal considered the Petition for Writ of Mandate and denied it. Unless this Court promulgates a new rule equivalent to the independent review of the record in First Amendment cases, the facts and inferences drawn from the record which will be reviewed by this Court are those that support the judgment. In the Court of Appeal and the California Supreme Court the Appellant has continually attempted to argue his version of the facts and in effect obtain a new factual determination from the Appellate Courts. Now he has attempted to obtain a stay and obtain review by this Court by once again improperly giving his biased version of the facts. While Mr. Rothberg insists his

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[5/] The Trial Court also read Appellant's deposition, but Appellant did not include it as part of the record in the Mandate Petition. Appellant was represented in Los Angeles on his special appearance by the same attorneys representing the plaintiff and other cross-defendants. Counsel attempted to obtain an injunction freezing Mr. Rothberg's assets wherein they attempted to prove their version of the agreement. There were five hearings before the same judge who heard the motion to quash. At the last hearing, after the motion to quash, the judge denied the preliminary injunction, indicating in his comments that he disbelieved the version of the evidence which is also being advanced by Appellant herein.

version of the facts is true, what is more important is that they have been found to be true by the Trial Court. That is no surprise because Mr. Rothberg's and the Trial Court's version are consistent with the agreement set forth in writing in the Bankruptcy Court while Appellant is impeaching his own written representations.

The bottom line is that this is an appeal based on sufficiency of the evidence without findings of fact and conclusions of law, and Appellant is attempting to obtain a review by misrepresenting the facts which are properly before an Appellate Court and arguing therefrom. That is not appropriate. There is no constitutional defect in California's procedure for determining jurisdiction by means of an evidentiary hearing and providing for interlocutory review by the Appellate Courts.

2. MOTION TO DISMISS

A.

THERE IS NO SUBSTANTIAL FEDERAL QUESTION

From the foregoing discussion of the facts and the merits it is clear that the question sought to be framed and raised by Appellant is devoid of merit and does not raise a substantial Federal question. Rather than reargue the prior discussion on the merits, we incorporate it herein as a basis for dismissal for lack of a substantial Federal question.

B.

THE CASE IS MOOT

Appellant filed an answer in the Superior Court. He conceded in his ex parte application for a stay to Mr. Justice Rehnquist that the matter would be moot unless a stay were granted. Appellant now ignores his prior representation. We choose not to ignore it and respectfully submit that the subsequent filing of an answer and submission to jurisdiction in California makes the instant proceeding moot.

In his stay application, at pages 6-8, Appellant argued that under California law if Appellant answered he would waive his jurisdictional objection, citing *Neihaus v. Superior Court* (1977) 69 Cal.App.3d 340, 137 Cal.Rptr. 905, and *Terzich v. Medak* (1978) 78 Cal.App.3d 636, 144 Cal.Rptr. 323. We believe that to be a correct statement of California law; Appellant is right, he has waived his claim by filing a general appearance, and the instant appeal is moot.

C.

NO APPEAL LIES FROM THE INSTANT JUDGMENT

Appellant argues that the instant judgment is reviewable on "appeal" rather than certiorari because he challenges the constitutionality of California Code of Civil Procedure §410.10 as applied.

In his Jurisdictional Statement Appellant states the true fact:

> ". . . in his Memorandum of Points and Authorities in support of his Motion to Quash Service of Summons, appellant raised the claim that the exercise of personal jurisdiction over him would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution."
>
> Jurisdictional Statement, pp. 3-4.

Simply put, in the Courts Below Appellant moved to quash on the grounds that the Due Process Clause precluded the exercise of jurisdiction over him, not on the ground that the long arm statute was unconstitutional as applied. Under ***Kulko v. California Superior Court, supra,*** 436 U.S. at 90, and including footnote 4, Appellant's remedy is certioriari, not appeal. The motion to quash was made on the ground that the Constitution itelf would not permit the exercise of jurisdiction, not on the unconstitutionality of the statute. Appellant is trying to introduce a new theory, perhaps in response to the suggestion of some commentators that there is a greater statistical chance of a hearing being granted by this Court for an appeal or that on appeal this Court may review the merits while it might not on certiorari. While we recognize that the result of a dismissal on this basis may result in the Court treating the Jurisdictional Statement as a Petition for Certiorari — a result which encourages litigants such as Appellant to take a free shot at an appeal even while citing the case which says no appeal lies — nevertheless under ***Kulko, id.***, and more recently ***Crawford v. Los Angeles Board of Education*** (1982) ____U.S.____, 102 S.Ct. ____, 73 L.Ed.2d 948, we do not see how a constitutional challenge can be made

to a statute which adopts the standards of the Constitution itself, nor how it was raised below in this case. Treated as an appeal, this appeal should be dismissed.

3. MISCELLANEOUS

As he has done in each preceding Court and in the stay application in this Court, Appellant refers to a purported statement made to Judge Ryan in New York that Appellant was sued because he would not appear for deposition. This allegation was denied in the Answer to the Petition for Writ of Mandate; it is not true. Logically, the underlying need for a suit in California to compel a deposition is spurious. California Code of Civil Procedure Section 2024 provides for taking the deposition of out of state witnesses. Legally, the assertion has nothing to do with the jurisdictional issue. No authority is now, nor has any ever been, cited connecting these purported facts to jurisdiction. If it has any relevance to the instant issues, it was impliedly found not to be true by the Trial Court. It is a blatant attempt to prejudice this Court with an irrelevancy. We have challenged Appellant to justify this remark in the Appellate Courts Below and in this Court; he has not, yet he continues to try to prejudice each Court with its use.

CONCLUSION

The legal standards for the exercise of jurisdiction by California are those governing intentional torts in commercial transactions. Appellant has grossly misrepresented the facts properly before the Court in an effort to obtain a hearing. There is no credible attack on the California procedure. The facts which support the order appealed from (the true facts) are as asserted by Mr. Rothberg and found to be true by the Trial Court. And Appellant has filed an answer and the instant appeal is moot.

WHEREFORE Real Party in Interest Manuel F. Rothberg prays that the instant appeal be dismissed or affirmed, and if treated as a Petition for Writ of Certiorari, the Petition be denied.

Dated: January 17, 1983.

Roger P. Heyman, Esq.
Stuart L. Brody, Esq.

VALENSI AND ROSE, PLC

By: Stuart L. Brody
Attorneys for Real Party in
Interest, Manuel F. Rothberg

APPENDIX A

Paragraph 7 of Application to Bankruptcy Court

7. In conjunction with the instant sale, as well as Beck's plan of liquidation, it will become necessary and appropriate to liquidate Sloane's inventory. Therefore, at this time Applicant seeks the authorization of this Court, upon approval of the Agreement, to liquidate Sloane's inventory in a manner consistent with the terms of the Agreement. Applicant believes it would be in the best interests of the estate herein and its creditors, if the liquidation were to be conducted under the supervision and control of Emanuel Rothberg, who is currently president of Sloane. For his services in connection with the liquidation of the Sloane's inventory, applicant proposes to pay to Mr. Rothberg 10% of the net profit, which applicant believes is reasonable, considering Mr. Rothberg's knowledge of the furniture business and his familiarity with the Sloane's entire operation. Applicant believes that this would be the least expensive and most expeditious method of liquidating Sloane's inventory.

APPENDIX B

Telegram from Trustee to Mr. Rothberg

January 4, 1982

MANUEL F. ROTHBERG
W AND J SLOANE
9568 WILSHIRE BOULEVARD
BEVERLY HILLS, CA 90212

DEAR MANNY:

ON THE APPLICATION ON SLOANE'S BY THE TRUSTEE PAGE 3 PARAGRAPH 7 CONTAINS AN ERROR BY THE ATTORNEYS WHICH THEY HAVE BEEN STRONGLY TOLD ABOUT AND ARE NOW IN THE PROCESS OF CORRECTING. ON BEHALF OF SHEA AND GOULD, MY APOLOGIES.

STEPHEN KIRSCHENBAUM, TRUSTEE

APPENDIX C

Letter from Appellant to Bankruptcy Court

January 5, 1982

Honorable Edward J. Ryan
United States Bankruptcy Judge
United States Courthouse
Foley Square
New York, New York

Re: Beck Industries, Inc. - Sale of Sloane Lease

Dear Judge Ryan:

On reviewing the application submitted to Your Honor in connection with this Court's Order dated December 24, 1981, I note that at paragraph 7 on page 3 there is a statement to the effect that the Trustee proposes to pay Mr. Rothberg 10% of the "net profit" realized on the sale of Sloane's inventory. In point of fact, the Trustee proposes to pay Mr. Rothberg 10% of the "gross proceeds" to be received by Sloane from such inventory liquidation, not 10% of Sloane's "net profit".

I appologize for any inconvenience to you in this regard.

Respectfully yours,

/s/ Lonn A. Trost

Lonn A. Trost

APPENDIX D

California Code of Civil Procedure
§ 418.10

(a) A defendant, on or before the last day of his time to plead or within such further time as the court may for good cause allow, may serve and file a notice of motion either or both:

(1) To quash service of summons on the ground of lack of jurisdiction of the court over him.

(2) To stay or dismiss the action on the ground of inconvenient forum.

(b) Such notice shall designate, as the time for making the motion, a date not less than 10 nor more than 20 days after filing of the notice. The service and filing of the notice shall extend the defendant's time to plead until 15 days after service upon him of a written notice of entry of an order denying his motion, except that for good cause shown the court may extend the defendant's time to plead for an additional period not exceeding 20 days.

(c) If such motion is denied by the trial court, the defendant, within 10 days after service upon him of a written notice of entry of an order of the court denying his motion, or within such further time not exceeding 20 days as the trial court may for good cause allow, and before pleading, may petition an appropriate reviewing court for a writ of mandate to require the trial court to enter its order quashing the service of summons or staying or dismissing the action. The defendant shall file or enter his responsive

pleading in the trial court within the time prescribed by subdivision (b) unless, on or before the last day of his time to plead, he serves upon the adverse party and files with the trial court a notice that he has petitioned for such writ of mandate. The service and filing of such notice shall extend his time to plead until 10 days after service upon him of a written notice of the final judgment in the mandate proceeding. Such time to plead may for good cause shown be extended by the trial court for an additional period not exceeding 20 days.

(d) No default may be entered against the defendant before expiration of his time to plead, and no motion under this section, or under Section 473 or 473.5 when joined with a motion under this section, or application to the court or stipulation of the parties for an extension of the time to plead, shall be deemed a general appearance by the defendant.

No. 82-1037

Supreme Court of the United States

OCTOBER TERM, 1982

LONN A. TROST,

Appellant,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,

Appellee.

MANUEL F. ROTHBERG,

Real Party in Interest.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

BRIEF IN OPPOSITION TO MOTION TO DISMISS

MARTIN I. SHELTON
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330 Madison Avenue
New York, New York 10017

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BRIEF IN OPPOSITION TO MOTION TO DISMISS

Preliminary Statement

This appeal involves a single substantial federal question, namely, whether or not the Appellant, Lonn A. Trost, a non-resident of the State of California, had such minimal contacts with the State of California so that a California court could exercise personal jurisdiction over him. Unfortunately, the Motion to Affirm/Dismiss does not address that issue. Instead, the motion misstates the issues and Appellant's contentions, distorts the record below, and incorrectly states the facts.

In this brief, Appellant will clarify the record, correctly set forth the facts, and will then argue the following substantive issues:

1. Under the facts presented to the Los Angeles Superior Court there were insufficient minimal contacts for that court to exercise personal jurisdiction over the Appellant; and

2. The appeal is not moot by reason of the fact that Appellant eventually filed a general appearance in the Superior Court.

As a final matter, Appellant will discuss the procedural issue raised by the motion, namely, whether or not appeal or certiorari is the proper vehicle for review by this court.

Counter Statement of the Case

The Record

The Motion to Affirm/Dismiss accurately narrates the chronological sequence of the various proceedings in the California courts namely, the Superior Court, the Court of Appeal and the Supreme Court. However, the substantive issue raised by this appeal is to be determined solely on the record before the Superior Court where Appellant's Motion to Quash Service of Summons was filed and heard. The remaining court proceedings only involved the affirming without opinion of the Superior Court's ruling and Appellant's attempts to obtain stays so that he could prosecute his appeal to this court.

The procedure which has been set up by the California legislature for attacking service of summons is as follows. The served party may make a motion to quash on the ground of lack of jurisdiction of the court over him. *Code of Civil Proc.*, § 418.10(a)(1). Such a motion is generally heard and determined on the basis of declarations/affidavits [1] as was done in the case at bar. The plaintiff (or

[1] Under California law a declaration under penalty of perjury is the equivalent of an affidavit. *Code of Civ. Proc.* § 2015.5.

cross-complainant) has the burden of proving by a preponderance of the evidence [2] that the nonresident defendant had sufficent contacts with California to support service of process. *Frederick Fell, Inc.* v. *Superior Court*, 36 Cal. App. 3d 93, 95, n.3, 111 Cal. Rptr. 219 (1973); *Sheard* v. *Superior Court*, 40 Cal. App. 3d 207, 211, 114 Cal. Rptr. 743 (1974). The sufficiency of an affidavit is tested by the same rules as those applicable to oral testimony. *Mayo* v. *Beber*, 177 Cal. App. 2d 544, 551, 2 Cal. Rptr. 405 (1960). Affidavits which merely state conclusions of law or which are based on information and belief are hearsay, do not create a conflict as to facts and must be disregarded. *Petri Clearners, Inc.* v. *Automotive Emp. Laundry Drivers & Helpers Local No. 88*, 53 Cal. 2d 445, 469, n.5, 2 Cal. Rptr. 470 (1960). A verified complaint must meet the same standards as an affidavit. *E. H. Renzel Co.* v. *Warehousemen's Union*, 16 Cal. 2d 369, 370, 106 P.2d 1 (1940); *Continental Baking Co.* v. *Katz*, 68 Cal. 2d 512, 532, 67 Cal. Rptr. 761 (1968); *Macmorris Sales Corp.* v. *Kozak*, 249 Cal. App. 2d 998, 1003, 58 Cal. Rptr. 92 (1967).

If such a motion to quash is denied, then the defendant may petition the court of appeal by writ of mandate for a review of that decision. *Code of Civ. Proc.* § 418.10(c). This was done in the case at bar and the court of appeal denied the writ without opinion, thus affirming the ruling of the Superior Court. Appellant's last opportunity for review in the California court system was the filing of a petition for a hearing in the California Supreme Court which he did and which was denied. Thus, for the purpose of reviewing and deciding the substantive issue on this appeal, attention must be focused on the *facts presented to the Superior Court* by Appellant and by Rothberg. The

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[2] Preponderance of the evidence means such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein. *Butcher* v. *Thornhill*, 14 Cal. App. 2d 149, 152, 58 P.2d 179 (1936).

question for determination, then, is whether or not these facts showed sufficient minimal contacts of Appellant with the State of California.

The facts which were before the Superior Court were set forth in three documents: (1) the declaration of Appellant; (2) the verified cross-complaint filed by Rothberg; and (3) portions of Appellant's deposition testimony. Thus, the determination of whether or not there were sufficient minimal contacts must be made on the basis of those documents and no others. Hearsay statements, statements on information and belief and conclusions of law contained therein must be disregarded. These facts were accurately set forth in Appellant's Jurisdictional Statement, pp. 4-9.

Misstatements by Rothberg of the Facts

No other facts were before the Superior Court relating to the contacts, minimal or otherwise, of Appellant with California. But, the Motion to Affirm/Dismiss improperly alludes to other facts and non-facts which were not before the Superior Court. The Motion states [p. 3] that Appellant promised to pay Rothberg 10% of the gross proceeds and that this promise was first discussed in a telephone call made by Appellant to Rothberg. There was no evidence before the Superior Court to support those statements. Appellant did not promise Rothberg anything. *The contract to pay Rothberg 10% of the gross proceeds of the sale is between Rothberg and the Trustee. Appellant is not a party thereto.* Secondly, Appellant did not call Rothberg. To the contrary, Appellant stated that Rothberg called Appellant in New York to advise him there would be a meeting with the Trustee the following week. Rothberg erroneously states [pp. 3-4] that Appellant represented to Rothberg at the meeting in New York that the agreement need not be reduced to writing. There is no evidence to support that statement. That statement is based on an allegation in the cross-complaint based on information and belief and accordingly must be disregarded. Rothberg also states [p. 5] that "much of the profit [was] transferred to New York."

There is not a single fact in the record to support that statement. Rothberg states [p. 5] that Appellant repudiated the agreement. Again there is nothing in the record to support such an assertion. Indeed, Rothberg concedes that Appellant was not a party to the contract. Finally, Rothberg refers [p. 14, n. 5] to other proceedings in the Superior Court held *after* the hearing on the motion to quash which, of course, are not part of the record on this appeal.

In his motion Rothberg makes the following statement:

> "If Appellant's 'facts' [as stated in Appellant's Jurisdictional Statement filed December 18, 1982] were the true facts, the results might have been different in the Courts Below, but they are not anywhere near the true facts, as the Courts Below could and did easily determine from the record and the evidence presented to them." [p. 3]

As can be seen from the summary of the evidence, above, the facts presented by Appellant in his Jurisdictional Statement were, in fact, the true facts. Moreover, the statement is misleading because it suggests that the facts presented to California courts other than the Superior Court are relevant to the issue on this appeal. Not true. The appeal stands or falls on the basis of the record *presented to the Superior Court*. As can be seen from the above summary, the facts presented by Rothberg were essentially the same facts presented by Appellant relating to the discussions of the agreement and the processing of the paper work in the Bankruptcy Court *all of which occurred in New York*. Rothberg fails to allege a single fact showing any contact by Appellant with the State of California which, of course, is the critical issue on this appeal. It is not sufficient to argue, as Rothberg does herein, that because he, a California resident, was allegedly damaged by a nonresident, California has jurisdiction of the nonresident. That argument is an over-simplified non sequitur unsupported by case authority.

ARGUMENT

I

Appellant Lacked Sufficient Minimal Contacts With California to Justify the Exercise of Personal Jurisdiction Over Him by the California Courts.

California courts are by statute permitted to exercise jurisdiction over nonresidents "on any basis not inconsistent with the Constitution of this state or of the United States." *Code of Civ. Proc.* § 410.10. "This statute manifests an intent to exercise the broadest possible jurisdiction. The constitutional parameters of this jurisdiction are found in the decisions of the United States Supreme Court." *Michigan National Bank* v. *Superior Court,* 23 Cal. App. 3d 1, 6, 99 Cal. Rptr. 823 (1972). "As a general constitutional principle, a court may exercise personal jurisdiction over a nonresident individual so long as he has such minimal contacts with the state that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Sibley* v. *Superior Court,* 16 Cal. 3d 442, 445; 128 Cal. Rptr. 34 (1976).

The evidence presented to the Superior Court failed to show any contacts whatsoever between Appellant and the State of California. The evidence showed only contacts with *Rothberg in New York* and the filing of documents in the Bankruptcy Court in New York. The cause of action against Appellant did not arise out of or have a substantial connection with any activity of Appellant in California. The only "contact," if it can be called that, is that such conduct in New York had an effect upon Rothberg in California. Assuming that is true, it is submitted that such contact is insufficient to meet the constitutional standard. There has been no activity of the Appellant in California. None of Appellant's conduct has a substantial connection to California. If the rule requested by Rothberg were adopted, then it is obvious that each state court would become a national court. The argument proves too much.

The constitutional standard is based upon sufficient minimal contacts with the state such that the maintenance of the action does not offend traditional notions of fair play and substantial justice. That is still the test whether or not the alleged cause of action is based upon negligent or intentional conduct. The unstated principle and the silent error in Rothberg's argument is the proposition that in personam jurisdiction may be asserted against a nonresident defendant who commits an intentional tort regardless of contacts with the forum state. That must be his position because it is clear from the evidence set forth above that Appellant had absolutely no contacts at all with California with respect to the alleged cause of action. It must be remembered that the contract upon which Rothberg is suing was between Rothberg and the Trustee. *Appellant is not a party to that contract.* All he did was witness conversations relating to it which occurred in New York and prepare the necessary papers required by the Bankruptcy Court in New York.

Rothberg relies on two California decisions, *Abbott Power Corp.* v. *Overhead Electric Company*, 60 Cal. App. 3d 272, 131 Cal. Rptr. 508 (1976) and, *Jones* v. *Calder*, —— Cal. App. 3d ——, —— Cal. Rptr. —— (1982)[3], which involve intentional torts but which are easily distinguishable from the case at bar. In both cases there was substantial activity in California, namely letters and circulating a newspaper.

There simply are no contacts between Appellant and California relative to the case at bar. He did nothing in California. His only involvement in the case was as a witness to discussions in New York of a contract between Rothberg and the Trustee and the preparation of the necessary

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[3] This is a decision dated December 15, 1982 of the Court of Appeal. The decision is not final. On January 18, 1983, the defendant therein filed a petition for hearing in the California Supreme Court. That Court has until February 14, 1983, to rule on said petition. The Court may extend its time another 30 days. *California Rules of Court*, Rule 28(a).

papers required by the Bankruptcy Court. He had "contact" with Rothberg in New York. It is submitted that such contact is not contact with California within the constitutional principle so as to justify a California court's asserting personal jurisdiction over a nonresident.

II

The Appeal Is Not Moot.

In his application for an emergency stay directed to the Honorable William H. Renquist, Appellant argued in support of his application that he feared he would waive his obligation to the jurisdiction should he be compelled to file a general appearance in the California action, citing *Neihaus* v. *Superior Court*, 69 Cal. App. 3d 340, 138 Cal. Rptr. 905 (1977), and *Terzich* v. *Medak*, 78 Cal. App. 3d 636, 144 Cal. Rptr. 323 (1978). Nevertheless, his application for a stay was denied and thereafter Appellant filed a general appearance in the case. This harsh rule of the California courts has been criticized and avoided in many cases. *See, e.g., Goodwine* v. *Superior Court*, 63 Cal. 2d 481, 47 Cal. Rptr. 201 (1965); *Forbes* v. *Cameron Petroleum, Inc.*, 83 Cal. App. 3d 257, 147 Cal. Rptr. 766 (1978); *Berard Construction Co.* v. *Municipal Court*, 49 Cal. App. 3d 710, 122 Cal. Rptr. 825 (1975); *Fount Wip, Inc.* v. *Goldstein*, 33 Cal. App. 3d 184, 108 Cal. Rptr. 732 (1973); *Batte* v. *Bandy*, 165 Cal. App. 2d 527, 332 P.2d 439 (1958); *Bank of America* v. *Carr*, 138 Cal. App. 2d 727, 292 P.2d 587 (1956). Moreover, Appellant is aware of no decision of this Court holding that such is a waiver. However, a recent decision of the California Court of Appeal holds that a waiver does not occur should a general appearance be made after an unsuccessful challenge to the service of process. In *In Re Marriage of Smith*, —— Cal. App. 3d ——, 185 Cal. Rptr. 411 (August 31, 1982), the wife filed an action for dissolution of marriage against her husband. The husband was served contrary to law. Thereafter, a default judgment was entered against the husband. Five months later the wife instituted a proceeding to increase the child support and

properly served the husband. The husband then filed a motion to quash the original service of summons upon him and to set aside the default judgment. The husband also requested a continuance of the support proceedings which request constituted a general appearance. The wife contended that this general appearance cured whatever defect there had been in the original service of summons. The court rejected this argument and set aside the default judgment.

The opinion is significant because it discusses for the first time the effect of the enactment by the California legislature in 1969 of the Jurisdiction and Service Of Process Act, *Code of Civil Procedure*, §§ 410.10, *et seq.* The court held that the new act was a comprehensive and detailed statutory plan covering jurisdiction, process and related problems and that it preempted the entire area of law relating to such subjects. Therefore, the court concluded that the common law rules concerning such subject matter were no longer a part of California law. The court continued: "No mention is made in the Act of the common law rule . . . that a general appearance retroactively turns an invalid service into a valid one. Such a rule could easily have been stated. This omission manifests legislative rejection of the rule." —— Cal. App. 3d at ——, 185 Cal. Rptr. at 416.

Thus, in the case at bar, the filing of the general appearance by Appellant does not retroactively turn the original invalid service into a valid one. This is a salutary rule because it permits a defendant to continue to press his constitutional objection. If the rule were otherwise then he must make a choice either (1) to defend and give up his constitutional objection or (2) to take the risk and suffer the consequences of letting a default judgment be entered against him. There is no reason for forcing such a Hobson's choice upon a litigant or to denigrate his fundamental constitutional objection in such an indirect manner.

Finally, the reason why an appeal to this Court is appropriate rather than a petition for certiorari is fully set forth

in the Jurisdictional Statement, pp. 2-3. Suffice it to say that Rothberg has failed to distinguish the cases set forth therein.

Rothberg asserts that *Kulko* v. *California Superior Court*, 436 U.S. 84 (1978), precludes an appeal to this court. *See* Motion to Dismiss, p. 17. However, the two cases are distinguishable. In *Kulko*, appellant never attacked the Constitutionality of the state statute, only that jurisdiction should not be maintained over him. *See Kulko, supra* at 90 n.4. Here, Trost consistently attacked the constitutionality of § 410.10, Cal. Civ. Proc. Code (West 1982), as construed to apply to him. This attack certainly falls within the ambit of 28 U.S.C. § 1257(2).*

CONCLUSION

For these reasons, appellees motion to dismiss should be denied and this court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Dated: New York, New York
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* Appellant submits that even if appellate jurisdiction is found lacking, this court should treat these papers as a petition for certiorari pursuant to 28 U.S.C. § 2103.